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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALBERT LOPEZ, Defendant and Appellant.	F073918 (Super. Ct. No. VCF329369A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Keith P. Sager, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Franson, Acting P.J., Meehan, J. and Black, J.[†]

[†] Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Defendant Albert Lopez contends on appeal that (1) the trial court erred in imposing penalty assessments attached to a criminal laboratory analysis fee (lab fee) and a drug program fee (program fee), and (2) the order prohibiting him from owning or possessing a concealable weapon is unauthorized. We strike the concealable weapon prohibition, order the abstract of judgment amended in two regards, and affirm as so modified.

PROCEDURAL SUMMARY

On January 28, 2016, defendant pled guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378;[1] count 1) and possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 4).

On May 25, 2016, the trial court imposed the indicated term of five years four months. The court stayed the two-year term on count 4 pursuant to Penal Code section 654. The court imposed various fines and fee, including a $50 lab fee (§ 11372.5, subd. (a) (hereafter § 11372.5(a))[2] and a $100 program fee (§ 11372.7, subd. (a) (hereafter § 11372.7(a)),[3] plus a total of $450 in related penalty assessments. The court

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1 All statutory references are to the Health and Safety Code unless otherwise noted.

2 Section 11372.5(a) provides: "Every person who is convicted of a violation of Section 11350, 11351, 11351.5, 11352, 11355, 11358, 11359, 11361, 11363, 11364, 11368, 11375, 11377, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, 11382, 11383, 11390, 11391, or 11550 or subdivision (a) or (c) of Section 11357, or subdivision (a) of Section 11360 of this code, or Section 4230 of the Business and Professions Code shall pay a criminal laboratory analysis fee [lab fee] in the amount of fifty dollars ($50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law."

3 Section 11372.7(a) provides: "Except as otherwise provided in subdivision (b) or (e), each person who is convicted of a violation of this chapter shall pay a drug program fee in an amount not to exceed one hundred fifty dollars ($150) for each separate offense.

also ordered defendant not to own or possess a firearm, a concealable weapon, ammunition or reloaded ammunition, and advised him that possession of such items by a felon is a felony under Penal Code sections 29800, subdivision (a)(1) and 30305, subdivision (a)(1), and could result in a separate prosecution.

On June 20, 2016, defendant filed a notice of appeal.

On October 7, 2016, defendant filed a motion in the trial court for corrections of his fines, fees, and penalties pursuant to Penal Code section 1237.2. Relying on *People v. Watts* (2016) 2 Cal.App.5th 223 (*Watts*), defendant requested that the court strike all of the penalty assessments attached to the lab and program fees. In the alternative, he argued that the penalty assessments were miscalculated by $15. In response, the trial court reduced the assessments by $15 and amended the abstract of judgment to so reflect.

DISCUSSION

I. Penalty Assessments

Defendant contends we should vacate the penalty assessments because the lab and program fees are not fines, penalties, or forfeitures, and thus they do not trigger any penalty assessments. Defendant recognizes the split in authority, and he urges us to adopt the reasoning of *Watts, supra*, 2 Cal.App.5th 223 and depart from our decision in *People v. Sierra* (1995) 37 Cal.App.4th 1690 (*Sierra*).

Penalty assessments apply to any "fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses" and increase such fines, penalties, or forfeitures by a specified amount. (E.g., Pen. Code, § 1464, subd. (a)(1); Gov. Code, § 76000, subd. (a)(1).) In *Sierra, supra*, 37 Cal.App.4th at page 1696, we concluded that the program fee (§ 11372.7(a)) is a fine or penalty to which penalty assessments are applicable.

The court shall increase the total fine, if necessary, to include this increment, which shall be in addition to any other penalty prescribed by law."

In *People v. Martinez* (1998) 65 Cal.App.4th 1511, the court applied our reasoning to the lab fee specified in section 11372.5(a): "Under the reasoning of *Sierra*, we conclude … section 11372.5, defines the [lab] fee as an increase to the total fine and therefore is subject to penalty assessments under [Penal Code] section 1464 and Government Code section 76000." (*People v. Martinez*, *supra*, at p. 1522; see *People v. Sharret* (2011) 191 Cal.App.4th 859, 869-870 [because lab fee was punitive in nature, court was required to stay its imposition under Pen. Code, § 654]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257 [court required to impose state and county penalty assessments on lab fee]; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332 [abstract of judgment had to be amended to include lab fee imposed because it was "an increment of a fine"]; see also *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157 [dictum noting that the trial court "had no choice and had to impose" penalties upon the lab fee].)

Some courts, however, have held to the contrary. *Watts*, which itself noted that its holding was "contrary to the weight of authority," held that the lab fee "is not subject to penalty assessments." (*Watts*, *supra*, 2 Cal.App.5th at p. 226; see *People v. Vega* (2005) 130 Cal.App.4th 183, 193-195 [lab fee is not punishment for purposes of Pen. Code, § 182, subd. (a)].)

We decline to reconsider *Sierra*. Furthermore, we agree with the court's holding that the lab fee, like the program fee, is a fine or penalty that is subject to penalty assessments. Accordingly, in defendant's case, the penalty assessments on the program and lab fees were proper.

II. Concealable Weapon Prohibition

Defendant contends, and the People concede, that although the trial court was statutorily authorized to advise him he was prohibited from owning or possessing firearms or ammunition, the prohibition against owning or possessing a concealable weapon other than a firearm was unauthorized and must be stricken.

The trial court's order relied on the following two statutes: Penal Code section 29800, subdivision (a)(1) provides:

> "Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of [Penal Code] Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony."

And Penal Code section 30305, subdivision (a)(1) provides:

> "No person prohibited from owning or possessing a firearm under Chapter 2 (commencing with [Penal Code] Section 29800) or Chapter 3 (commencing with [Penal Code] Section 29900) of Division 9 of this title, or Section 8100 or 8103 of the Welfare and Institutions Code, shall own, possess, or have under custody or control, any ammunition or reloaded ammunition."

The parties agree, as do we, that neither statute supports the court's order prohibiting owing or possessing a concealed weapon other than a firearm. We agree the order should be stricken.

III. Amendment of the Abstract of Judgment

The People request a second correction to the abstract of judgment, noting that it improperly reflects that the sentence on count 4 was concurrent rather than stayed pursuant to Penal Code section 654. We agree.

DISPOSITION

The order prohibiting defendant from owning or possessing a concealable weapon is stricken. The two-year sentence on count 4 is a stayed term pursuant to Penal Code section 654, rather than a concurrent term. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect these two changes and to forward certified copies of the amended abstract of judgment to the appropriate entities.